



State of New Jersey
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

August 28, 2012 Government Records Council Meeting

David Marc Drukaroff
Complainant

Complaint No. 2011-242

v.

New Jersey Department of Law & Public Safety,
Division of State Police
Custodian of Record

At the August 28, 2012 public meeting, the Government Records Council (“Council”) considered the August 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s response to the Complainant’s OPRA request informing the Complainant that the requested records were exempt from disclosure under OPRA as criminal investigatory records when in fact no records existed constituted an insufficient search and an unlawful response to a request for access. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.
2. Because the Custodian has certified that no records responsive to the Complainant’s OPRA request exist and because there is no competent, credible evidence in the record to refute the Custodian’s certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.



Final Decision Rendered by the
Government Records Council
On The 28th Day of August, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 30, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
August 28, 2012 Council Meeting**

**David Marc Drukaroff¹
Complainant**

GRC Complaint No. 2011-242

v.

**New Jersey Department of Law & Public Safety,
Division of State Police²
Custodian of Records**

Records Relevant to Complaint:

1. A copy of the 1996 audio tape recording of K.S.W. and her killer's voice that was admitted into evidence during the trial of Michael LaSane.
2. A copy of the "scientific evidence" that proves that the shootings of A.C., A.Cn., and A.G. in Atlantic City, New Jersey on December 11, 1982 and December 12, 1982 were linked together.

Request Made: July 17, 2011

Response Made: July 18, 2011

Custodian: Ismael E. Vargas

GRC Complaint Filed: July 25, 2011³

Background

July 17, 2011

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form. The Complainant states that it is likely that Item No. 2 of his request will be a ballistic evidence photograph that shows how the "lands and grooves" theory applies and links all three (3) shootings.

July 18, 2011

Custodian's response to the OPRA request. The Custodian responds in writing via letter to the Complainant's OPRA request on the first (1st) business day following receipt of such request. The Custodian states that access to Item Nos. 1 and 2 of the Complainant's request are denied because the requested items are evidentiary items that are part of a criminal investigation that is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1. In addition, the Custodian states that the Complainant may wish to

¹ No legal representation listed on record.

² Represented by DAG Christine Kim, Esq., on behalf of the NJ Attorney General.

³ The GRC received the Denial of Access Complaint on said date.

proceed through the normal discovery process by making a request through the prosecuting agency.

July 25, 2011

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated July 17, 2011
- Letter from the Custodian to the Complainant dated July 18, 2011⁴

The Complainant states that he has requested scientific evidence that links the shootings of three individuals. The Complainant asserts that his request was denied because the records he seeks constitute criminal investigatory records. The Complainant requests that the GRC order the Custodian to disclose these records.

The Complainant contends that the criminal investigatory exemption privilege has been lost due to disclosure. The Complainant argues that if the Custodian desires exempt record to remain secret, then the Custodian is obligated to keep those records secret forever. The Complainant asserts that the State of New Jersey disclosed the existence of the requested records during his trial via the testimony of a witness. The Complainant states that the witness testimony confirmed the existence of the records. The Complainant asserts that the witness would not testify to the existence of non-existent records. The Complainant requests that the GRC order the Division of State Police to provide the Complainant with a copy of scientific evidence that proves the bullets and shell casings in the shooting of three (3) individuals came from the same weapon.

The Complainant agrees to mediate this complaint.

July 25, 2011

Offer of Mediation sent to the Custodian.

August 9, 2011

The Custodian declines to mediate this complaint.

August 4, 2011

Request for the Statement of Information (“SOI”) sent to the Custodian.

August 11, 2011

Custodian’s SOI with the following attachments:

- Complainant’s OPRA request dated July 17, 2011
- Letter from the Custodian to the Complainant dated July 18, 2011⁵

⁴ The Complainant attached additional documentation that is not relevant to the adjudication of this complaint.

⁵ The Custodian attached additional documentation that is not relevant to the adjudication of this complaint. David Marc Drukaroff v. NJ Department of Law and Public Safety, Division of State Police, 2011-242 – Findings and Recommendations of the Executive Director 2

The Custodian certifies that he searched through the New Jersey State Police Major Crime and Ballistics Unit, Criminal Justice Records Bureau, and Internal Records Management System. The Custodian certifies that the search revealed that the Division of State Police is not in possession of the requested records. The Custodian certifies that while criminal investigatory records have a five (5) year retention schedule before being placed on film for seventy five (75) years, there are no records responsive to the Complainant's request in this matter. The Custodian maintains that the Complainant's request was responded to in a timely manner and that OPRA does not require an agency to produce records that it does not have.

Analysis

Whether the Custodian failed to conduct a sufficient search before responding to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

Moreover, the Council has maintained that it is among a custodian's duties to do a complete search for the requested records before responding to a received OPRA request, as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law. In Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008), the custodian initially responded to the complainant's OPRA request by stating that no records responsive existed. The complainant, however, submitted e-mails that were responsive to her request with the Denial of Access Complaint. The custodian certified that, upon receipt of the e-mails attached to the Denial of Access Complaint, the custodian again searched through DEP files and this time located records responsive to this request. The GRC held that because the custodian performed an inadequate initial search, the custodian unlawfully denied the Complainant access to the requested records. *See also, Lebbing v. Borough of Highland Park (Middlesex)*, GRC Complaint No. 2009-251 (January 2011).

In the instant matter, upon receipt of the Complainant's OPRA request, the Custodian informed the Complainant that his request was denied because the request sought criminal investigatory files that were exempt from disclosure under OPRA. While lawful grounds to deny a request for such records, the Custodian later certified in the Statement of Information that the requested records do not exist. Accordingly, the evidence in the record indicates that the Custodian merely responded to what the

Complainant wrote in his request and failed to actually search for the requested records before providing the Complainant with a response. As in Schneble, the Custodian failed to conduct an adequate search. Accordingly, the Custodian's responding to the Complainant's request before actually searching for the requested records constitutes an unlawful denial of access.

Therefore, the Custodian's response to the Complainant's OPRA request informing the Complainant that the requested records were exempt from disclosure under OPRA as criminal investigatory records when in fact no records existed constituted an insufficient search and an unlawful response to a request for access. See Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.

Whether the Custodian unlawfully denied the Complainant access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions*..." (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

"... [t]he public agency shall have the burden of proving that the denial of access is authorized by law..." N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the instant complaint, the Complainant argues that the Custodian has unlawfully denied him access to the requested records and contends that since the requested records relate to a previous trial, they must exist. However, the Custodian

certified in the Statement of Information that there are no records responsive to the Complainant's request. Moreover, the Complainant did not provide any evidence to refute the Custodian's certification in this regard.

The Council has consistently held that no denial of access occurs when a custodian has demonstrated that no records responsive to a complainant's request exist. In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant's request existed and the complainant submitted no evidence to refute said certification. The GRC held the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and because there is no competent, credible evidence in the record sufficient to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's OPRA request informing the Complainant that the requested records were exempt from disclosure under OPRA as criminal investigatory records when in fact no records existed constituted an insufficient search and an unlawful response to a request for access. *See* Schneble v. New Jersey Department of Environmental Protection, GRC Complaint No. 2007-220 (April 2008). Accordingly, the Custodian has failed to meet her burden of proving that her initial denial of access was lawful as mandated by N.J.S.A. 47:1A-6.
2. Because the Custodian has certified that no records responsive to the Complainant's OPRA request exist and because there is no competent, credible evidence in the record to refute the Custodian's certification, pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the Custodian has not unlawfully denied the Complainant access to the requested records. N.J.S.A. 47:1A-6.

Prepared By: Darryl C. Rhone
Case Manager

Approved By: Karyn Gordon, Esq.

Acting Executive Director

August 21, 2012